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Supreme Court, U.S.
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No. 00-6567

IN THE

Supreme Court of the United States

LARRY DEAN DUSENBERY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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38 pp

QUESTION PRESENTED

Whether the federal government violated the Due Process Clause of the Fifth Amendment by failing to give actual notice to an inmate in its own prison system before it forfeited the inmate's property for its own benefit.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 223 F.3d 422 (6th Cir. 2000), and is reproduced in the Joint Appendix ("JA") at 67. The order of the district court is reported at 34 F. Supp. 2d 602 (N.D. Ohio 1999), and is reproduced at JA 55. A prior unreported court of appeals opinion is noted at 97 F.3d 1451 (Table) and is reproduced at JA 31.

JURISDICTION

The court of appeals entered judgment in this case on July 10, 2000. Petitioner filed a timely petition for rehearing or rehearing en banc, which the court of appeals denied on August 25, 2000. The petition for a writ of certiorari was filed on October 16, 2000, and the Court granted the writ on February 26, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

On April 23, 1986, petitioner Larry Dean Dusenbery was arrested at his home by the FBI. JA 1, 56. On July 15, 1986, he pled guilty to a drug charge and was sentenced to twelve years in prison and a six-year term of parole. JA 1-2. While in prison, Petitioner was convicted of another offense; and, therefore, he has remained in prison continuously since 1986. *See United States v. Dusenbery*, 89 F.3d 836 (Table) (6th Cir. 1996).

During a search of Petitioner's home on the day of his 1986 arrest, the FBI seized $21,939 in cash, a 1984 Chevrolet Monte Carlo, and numerous items of personal property, including a coat, a bracelet, a wallet, a briefcase, cellular telephones, and answering machines. JA 32; R 140 at 3.[1] After Petitioner's conviction, the Government abandoned or destroyed the personal items. The Government did not attempt to provide notice to Petitioner before doing so. JA 56.

Some time later, the Government began the process for administrative forfeiture of the other seized property pursuant to 21 U.S.C. § 881. Section 881(a)(6) provides for the civil forfeiture of property "furnished or intended to be furnished in exchange for a controlled substance . . . [and] all proceeds traceable to such an exchange . . . ." Seizure of such property is to be accomplished through the application of the customs laws, 19 U.S.C. §§ 1600-1609. 21 U.S.C. § 881(d). The customs laws provide for the administrative forfeiture of property worth $500,000 or less, without judicial involvement. 19 U.S.C. § 1607.[2] To effect the forfeiture, the Government must initiate proceedings within five years of discovery of the offense that forms the basis of the forfeiture. *Id.* § 1621. The Government initiates proceedings by publishing a notice of intent to forfeit the property once each week for three successive weeks "in a newspaper of general circulation in the judicial district in which the processing for forfeiture is brought," 21 C.F.R. § 1316.75(a); 19 U.S.C. § 1607(a), and

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[1] Citations to the district court record are referenced by "R" followed by a docket number.

[2] For items of property valued at more than $500,000, the Government must use judicial forfeiture proceedings. 19 U.S.C. § 1610.

sending a written notice to anyone "who appears to have an interest in" the property. *Id.* Anyone claiming an interest in the property has twenty days after the first publication to file a claim and a cost bond. *Id.* § 1608; 21 C.F.R. § 1316.75(b). That filing stops the administrative process and requires the Government to commence a judicial forfeiture proceeding. 19 U.S.C. § 1608; *see* 21 C.F.R. §§ 1316.76(b), 1316.78. If no claim is filed, the property is deemed forfeited and title vests in the United States. 19 U.S.C. § 1609.

In January 1987, when the FBI began the process to forfeit the Monte Carlo automobile, Petitioner was incarcerated at a federal prison in Kentucky. The Government sent notices of the forfeiture by certified mail to Petitioner at two private addresses in Ohio, sent another to him care of the Portage County Jail in Ohio, and sent a notice to Alma Dusenbery, his stepmother. JA 34. The record does not reflect whether anyone signed for any of that certified mail. *Id.* The Government also published notice of the forfeiture in an Ohio newspaper, the Cleveland Plain Dealer. *Id.* When no one submitted a claim to contest the forfeiture—as Petitioner could not, having no knowledge of the proceeding—the car was forfeited. JA 32.

In November 1988, the Government began a separate proceeding to forfeit the cash. At that time, Petitioner was incarcerated in the Federal Correctional Institute at Milan, Michigan (FCI Milan). The Government published notice of the forfeiture of the cash in the Cleveland Plain Dealer. JA 34. The Government also sent notice by certified mail addressed to Petitioner to two private addresses in Ohio and to FCI Milan. The first notice was returned unclaimed; the second was signed for by Edward Clouse, but there is no evidence of Mr. Clouse's relationship to Petitioner or that Mr. Clouse forwarded the notice to Petitioner. The third notice was signed for by an

employee of the FCI Milan mailroom. JA 33. There is no evidence of what happened to the notice after it reached the prison mailroom, JA 33-34; JA 36-37, 40; and neither the Government nor the courts below challenged Petitioner's statement that he did not receive the notice. When Petitioner did not follow the procedures for contesting the forfeiture—as he could not, having no knowledge of the proceeding—the money was forfeited. JA 32.

On November 12, 1993, Petitioner filed a motion for return of property pursuant to Federal Rule of Criminal Procedure 41(e). R 74. He filed the motion in the Northern District of Ohio under the docket number of the 1986 criminal proceeding against him. Petitioner's motion asked for return of his property on the ground that the government had neither returned it nor instituted forfeiture proceedings. *Id.* The government responded that it had either forfeited or destroyed all of the property seized from Petitioner. R 85, 92.

After briefing by both parties, the district court denied the motion for return of property. R 115; JA 55. The court held that it lacked jurisdiction because Petitioner had not contested the forfeiture in the manner set forth in the forfeiture statute and regulations. R 115 at 9-10; *see* JA 31.

The Sixth Circuit reversed. Citing cases from three other circuit courts, the court explained that federal courts have jurisdiction to hear "collateral due process attacks" on administrative forfeitures. JA 32. *See also United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993) ("federal courts have universally upheld jurisdiction to review whether an administrative forfeiture satisfied statutory and due process requirements"). Because Petitioner was raising a due process challenge to the adequacy of notice, the district court had jurisdiction. The Sixth Circuit further explained that

Petitioner's challenge could not proceed as a Rule 41(e) motion because the criminal proceedings against him had been completed and that the district court should have construed the motion as a civil complaint seeking equitable relief. JA 32.

The court went on to note certain flaws in the Government's evidentiary showing that Petitioner had adequate notice. JA 32-34. The court observed that, although notice of the forfeiture of the cash had been mailed to FCI Milan, where Petitioner was incarcerated, the certified mail receipt stated an inaccurate post office box (box 100 rather than box 1000), the signature on the receipt was illegible, and the Government had offered no evidence of the standard procedure for processing such letters at FCI Milan. JA 33-34. The court therefore could not conclude that the notice had arrived at the prison or that it had been forwarded to Petitioner through the prison mail system. As to the automobile, the court observed that the "evidence supporting the notice provided by the government for the forfeiture . . . appears even more attenuated," as the Government had not attempted to provide notice to Petitioner at the federal prison where he was housed at the relevant time. JA 34. And as to the personal property, the court "note[d] that the government has not provided any evidence that it gave [Petitioner] notice of the forfeiture." JA 34.

On remand, Petitioner took discovery, and both parties moved for summary judgment. R 138, 139. The Government submitted a declaration from James Lawson, an employee at the FCI Milan mailroom, who stated that the signature on the certified mail receipt was his. JA 36. He explained the prison's procedures for handling certified mail as follows: Mailroom staff travel to the post office to collect all mail sent to the prison, including inmate mail. A staff member signs for certified mail at the post office, then takes the mail back to the prison, where certified mail is entered into a mailroom log

book. A staff member from the inmates' Unit Team then signs the book, indicating receipt of the mail by that staff member, before taking the mail from the mailroom. The Unit Team staff member or other correctional staff then distributes the mail during the institution's mail call. JA 36-37. The Lawson Declaration also stated that log books are kept for only one year after they are closed and that the log book for the date relevant here no longer existed. JA 10. *See also* BOP Program Statement § 5800.10.409 (Nov. 3, 1995), *available at* http://www.bop.gov, described *infra* at 20. Thus, the most the Government could say was that, since the letter was received by mailroom staff, "it should have been" delivered to Petitioner. JA 37.

Petitioner's summary judgment motion challenged the adequacy of notice as to all three categories of property. As to the personal items, he relied on the fact that the Government had not attempted to provide any notice but had simply disposed of the property after Petitioner's sentencing. As to the automobile, Petitioner argued that notice was inadequate because the Government sent it to the Portage County Jail, when it knew that he was incarcerated in the federal prison at Ashland, Kentucky. As to the cash, Petitioner pointed out that the Government had addressed the certified mail to the wrong post office box, that it offered no proof that the notice sent to FCI Milan had been forwarded to him through the prison mail system, and that it knew that he was represented by counsel in the criminal proceedings but did not send notice of the forfeiture to his lawyer. R 138 at 7-8.

On July 23, 1997, the district court held an evidentiary hearing to determine the value of seventeen items of personal property that the government had destroyed without notice and without instituting forfeiture proceedings. R 147 at 2-3. During the hearing, the court recognized the inadequacy of the

notice as to the automobile and the miscellaneous personal items. *Id.* at 19, 21. Petitioner testified as to where he purchased the personal items and how much he had paid for them. In response to the court's questioning, he admitted that he had bought two items of personal property and probably the car with drug proceeds. *Id.* at 15-16, 20, 22. The court then asked for further briefing on the issue of whether Petitioner was entitled to compensation for those items and one other item that the court thought might have been bought with drug proceeds. *Id.* at 20, 22.

Soon thereafter, a new judge was assigned to the case and issued a final opinion and order. JA 55. First, the court held that the notice sent by certified mail to Petitioner at the prison where he was incarcerated was reasonably calculated to notify him of the forfeiture proceeding regarding the $21,939 in cash. JA 59-61. Second, the court held that Petitioner was not entitled to compensation for any of the personal property or for the Monte Carlo automobile because, although notice was inadequate, Petitioner had conceded that he purchased the property with drug proceeds. JA 65.[3]

The Sixth Circuit affirmed. The court held that the procedure for giving notice of the forfeiture of the cash—sending certified mail to the prison where the mailroom had a process for forwarding mail to inmates—was "reasonably calculated, under all the circumstances, to apprise [Petitioner] of the pendency of the action and afford [him] an opportunity to present [his] objections." JA 70 (citation omitted). The court held that due process did not require the Government to

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[3] In fact, Mr. Dusenbery had admitted to buying two items of personal property and possibly the car with drug proceeds, but none of the other items. *See* R 147 at 15-16, 20.

show that the mail actually reached Petitioner. *Id.* Turning to the automobile and the personal items, the court held that Petitioner had no property rights to any of that property because "one never acquires a property right to [drug] proceeds." JA 71.

This Court granted the petition for a writ of certiorari solely to consider the adequacy of the notice of forfeiture of the $21,939.

SUMMARY OF ARGUMENT

Individuals have a right, secured by the Due Process Clause, to a hearing to contest the forfeiture of their property. *Degen v. United States*, 517 U.S. 820, 822 (1996); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 266-67 (1871). "This right has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950); *Green v. Lindsey*, 456 U.S. 444, 449 (1982). For this reason, due process generally requires actual notice to interested parties prior to forfeiture. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796-97 (1983).

Personal service is the only guarantee of actual notice, yet some situations present practical obstacles to such service. In recognition of this fact, this Court has held that the provision of notice is subject to the "limits of practicability." *Mullane*, 339 U.S. at 318. Although a rigid rule prescribing the means of providing notice is not possible, "in any proceeding which is to be accorded finality," notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.

Mullane calls for a realistic appraisal of the adequacy of notice based on the circumstances presented in the individual case. *Mathews v. Eldridge*, 424 U.S. 319 (1976), supplies a useful structure for making that appraisal. Under the test stated in *Mathews*, the adequacy of procedures used to deprive an individual of life, liberty, or property is assessed by weighing three factors: the private interest at stake, the risk of erroneous deprivation associated with those procedures and the probable value of additional or different procedures, and the government's interest, including any burden that different procedures would impose.

Applied to the facts here, the *Mathews* test weighs decidedly in favor of requiring actual notice. The private interest at stake here is $21,939, but the same notice procedures are used with regard to property valued at as much as $500,000. The risk of erroneous deprivation is high. Published notice and notice sent to inmates' home addresses are empty gestures. And notice sent in care of a prison all too frequently results in non-delivery, as illustrated by the large number of reported cases in which inmates have challenged forfeitures for lack of notice. The probable value of additional or different procedures is also high, since the Government is in control of an inmate's whereabouts and is in a position to secure the cooperation of prison officials in ensuring actual notice.

Moreover, the burden on the Government of providing actual notice is minimal. The Government already uses three forms of inadequate notice—newspaper, certified mail to home address(es), and certified mail sent in care of the prison—any or all of which it could readily replace with efforts to secure delivery of notice directly to the inmate. In addition, the Government already maintains a detailed paper record of its attempts to provide notice. As a result, keeping a record demonstrating actual notice would not add to the Government's

paperwork burden. Furthermore, the Government's interest in forfeiting property used to facilitate or traceable to drug crimes is not threatened by a rule requiring actual notice; for the property at issue must be assumed to be legitimately owned until forfeiture proceedings are completed, especially items, such as cash or a coat found in a home, with no inherent connection to a drug transaction. To minimize due process protections out of respect for the Government's interest in forfeiting contraband or illegally acquired property would be equivalent to presuming that one is guilty until proved innocent. Such an approach would be particularly troubling here, where the Government stands to gain financially from forfeiture, and thus from inadequate notice.

Not only do the *Mathews* factors, taken together, cry out for more reliable notice in the circumstances presented here, but not one of the factors suggests otherwise. Although mail is often a reliable proxy for personal service—that is, a reliable means of providing actual notice—mail is not a reliable means of providing actual notice when the addressee is in prison. The Government's proxies for actual notice were constitutionally inadequate, and the forfeiture therefore violated due process.

Accordingly, the forfeiture of the money seized from Petitioner's home should be declared void. And because the Government allowed the statute of limitations for initiating forfeiture proceedings to pass without providing actual notice to Petitioner, it must return his property to him.

ARGUMENT

The Government took the property of Petitioner Dusenbery without providing actual notice, and it does not contest that fact. The question here is whether the substitutes for actual notice were sufficient to satisfy due process in the circumstances presented. This Court's due process jurisprudence provides the answer: Actual notice is required before the Government may forfeit property of a federal inmate.

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case*." *Mullane*, 339 U.S. at 313 (emphasis added). In *Mullane* and numerous cases thereafter, this Court, rather than setting up a rigid formula to dictate the means of providing notice, has emphasized that the sufficiency of notice varies with the circumstances. *Id.* at 315; *see Green v. Lindsey*, 456 U.S. at 451; *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956). In each case, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

Three factual circumstances dictate the outcome here. First, Petitioner was in a federal prison, and the Government knew exactly where. Second, the Government's ability to provide actual notice is better under the facts of this case than under virtually any other set of facts, since it alone controlled Petitioner's physical location. Third, the Government gained financially from *not* providing actual notice.

A. The Balance Of Factors Weighs Decidedly In Favor Of Actual Notice.

1. To identify the requirements of due process in a given situation, the Court balances the "interest of the State" and the "individual interest sought to be protected by the [Fifth] Amendment." *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 484 (1988) (quoting *Mullane*, 339 U.S. at 314). The Court has articulated the test as follows:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335.

Applied here, the *Mathews* balancing test, which essentially restates *Mullane*'s concern that notice be appropriate to the nature of the case, 339 U.S. at 313, demonstrates that the notice in this case failed to satisfy the constitutional standard. First, the private interest affected is $21,939—a significant sum for most individuals. The Government uses the same procedures used here for forfeitures of inmates' property valued at up to $500,000. *See* 19 U.S.C. § 1607. In addition, the Government may initiate separate administrative forfeiture proceedings for each piece of property seized from an

individual, which can raise the total value of the loss above $500,000. *See In re One 1985 Nissan, 300ZX*, 889 F.2d 1317, 1322 (4th Cir. 1989). For example, in Petitioner's case, the Government forfeited his car in a separate proceeding from his money. Although the combined value of these assets did not exceed $500,000, the Government's decision to initiate separate proceedings to forfeit different items of property seized at one time illustrates that $500,000 is not necessarily the maximum private loss at stake.

Second, the risk of erroneous deprivation and the probable value of additional procedures are both high. The "risk of erroneous deprivation" prong looks to the "fairness and reliability" of the existing procedures, *Mathews*, 424 U.S. at 343, such as whether the form of notice is likely to reach the intended individuals or whether hearing procedures are likely to provide a full and fair airing of the significant facts. The factual background of a case—that Petitioner had been convicted of drug charges, for instance—is not a proper consideration under this prong. *See id.* at 343-46 (second prong analyzed in terms of safeguards against mistake); *see also Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 894 (1961) ("This question cannot be answered by an easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action.").

The likelihood that notice published in a newspaper will reach an inmate in federal prison is negligible. Indeed, whether the notice is published in the local newspaper for the area where the seizure occurred, as in this case (where the publication appeared in Cleveland, Ohio, while the Petitioner was in a Michigan prison), or whether it is published in a national newspaper, *see, e.g.*, *United States v. Minor*, 228 F.3d 352, 354 (4th Cir. 2000) (publication in USA Today), this form

of notice to an inmate epitomizes notice that is a "mere gesture." *Id.* at 358-59 (quoting *Mullane*, 339 U.S. at 315).

The likelihood that an inmate will receive mail sent to his or her "home" address is only marginally better, since, as the Government knows for a certainty, the inmate is not at that address. Accordingly, this Court has recognized that notice mailed to an inmate's home address simply is not "'reasonably calculated' to apprise [the inmate] of the pendency of the forfeiture proceedings." *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) (citation omitted).

The likelihood that an inmate will receive notice sent in care of the prison where he or she is housed is certainly higher. Nonetheless, "this method of giving notice is suspect . . . [because], as a prisoner, the owner is unable to insure that he will receive the notice once the post office has delivered it to the institution. The owner is entirely dependant on the institution to deliver his mail to him." *Weng v. United States*, 137 F.3d 709, 715 (2d Cir. 1998); *cf. Houston v. Lack*, 487 U.S. 266 (1988) (notice of appeal by pro se prisoner deemed filed when delivered to prison authorities for mailing because of prisoner's lack of control over mail procedures). The significant risk that notice mailed to a jail or prison will not reach the inmate is evidenced by the many cases raising post-forfeiture challenges for lack of notice. *See, e.g., United States v. Campbell*, No. 99-2336, 2001 U.S. App. LEXIS 1912 (6th Cir. Feb. 2, 2001); *Whiting v. United States*, 231 F.3d 70 (1st Cir. 2000); *United States v. One Toshiba Television*, 213 F.3d 147 (3d Cir. 2000); *United States v. Poe*, No. 99-5089, 2000 U.S. App. Lexis 1905 (6th Cir. Feb. 7, 2000); *United States v. Five Thousand Dollars*, 184 F.3d 958 (8th Cir. 1999); *Weng*, 137 F.3d 709; *Small v. United States*, 136 F.3d 1334 (D.C. Cir. 1998); *United States v. Real Property*, 135 F.3d 1312 (9th Cir. 1998); *United States v. Clark*, 84 F.3d 378 (10th Cir. 1996); *see*

also, e.g., Minor, 228 F.3d 352 (notice sent to wrong facility); *United States v. Dusenbery*, 201 F.3d 763 (6th Cir.), *cert. denied*, 121 S. Ct. 301 (2000) (same); *Lopez v. United States*, 201 F.3d 478 (D.C. Cir. 1999) (same); *Boero v. DEA*, 111 F.3d 301 (2d Cir. 1997) (same); *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154 (2d Cir. 1994) (same).

Neither the Government nor the courts below disputed that Petitioner had not received the notice sent to him at FCI Milan. Nonetheless, the courts held that he had not been deprived of due process because the procedures in place at the prison were reasonably calculated to provide notice. JA 61, 70. However, although the Government, through the testimony of one mailroom employee, introduced evidence of the procedures in place at the prison for handling certified mail, JA 36, it offered nothing to show that the procedures were followed or effective in this case, or in general. *Cf. Five Thousand Dollars*, 184 F.3d at 960 (court unable to determine whether inmate received actual notice because prison's policy of documenting delivery to inmate by signing log book not followed). Instead, the Government admitted that it could not establish delivery of the notice to Petitioner. JA 40.[4]

In other words, the lower courts held that the procedures were constitutionally adequate based on their intuition about fairness, notwithstanding the absence of *any* evidence to show that the procedures worked in reality—that is, evidence that the procedures used did not carry an undue risk that a forfeiture

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[4] The Government could not produce the log book to show that the employee who signed for the mail at issue had logged it in, JA 40; it did not offer evidence that a staff member from Petitioner's unit had picked up that mail; it did not produce a staff member who recalled delivering that mail to Petitioner.

notice sent to the prison would not be delivered to the inmate for whom it was intended. The courts' conclusion that the procedures in place at FCI Milan were reasonable was made on the basis of a vague and abstract evidentiary record. The reality, as demonstrated by this case and numerous others, is that the risk of non-delivery is high when mail—certified or not—is sent to an inmate in care of a prison. *Cf. Mullane*, 339 U.S. at 320 ("Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.") (citation omitted).

Whereas the procedures that the Government uses to convey notice to inmates are not "reasonably certain to inform those affected," *id.* at 315, the probable value of additional procedures is high. Petitioner was incarcerated at a location chosen by the Government and could move only as the Government chose.

> [B]ecause the owner's jailor—the Bureau of Prisons—is part of the same government, and in many cases part of the same department of government, as the agency seeking to give notice, the forfeiting agent can in all probability easily secure the Bureau's cooperation in assuring that the notice will be delivered to the owner and that a reliable record of the delivery will be created.

Weng, 137 F.3d at 715; *see also Small*, 136 F.3d at 1338 ("The government can easily call the prison or the Bureau of Prisons, and find out . . . whether some problem at the prison prevented delivery."). In other words, when the government seeks to deliver a notice to an inmate, it knows where to find him or her and can be equally sure that he or she will be there when the papers are delivered. *One Toshiba Televison*, 213 F.3d at 154.

The Government can also verify delivery. *See* 28 C.F.R. § 540.19(a) (prison may request inmate to sign for receipt of legal mail).

Because the Government can control an inmate's whereabouts—both the prison in which an inmate is housed and the inmate's location within the prison at a given time—if the Government chose to ensure that an inmate actually received notice, it could easily do so. Indeed, "[w]hen an individual is incarcerated at a location of the government's choosing, the government's ability to find and directly serve him or her with papers is at or near its zenith." *One Toshiba Television,* 213 F.3d at 154. For example, in this case, the part of the Department of Justice that carried out the forfeiture (FBI) could obtain the cooperation of the part of the Department of Justice that was holding Petitioner (Bureau of Prisons) in assuring delivery of a notice and in obtaining a signed receipt from the inmate.

In contrast, under the procedure followed here for serving notice of forfeiture on prison inmates, the relevant form is not signed by the addressee but by a prison employee. The certified mail receipt "does not furnish reliable assurance of delivery to the owner [because] the receipt is to be signed not by the person but by the institution." *Weng*, 137 F.3d at 715 n.6. To correct this procedural defect, the Government could, for example, send the notice to a prison official, with a request that a prison employee watch the prisoner open the notice, co-sign a receipt, and mail the signed paper back to the agency from which it came. If the Government did not receive the signed notice back in a timely fashion, a telephone call to the prison warden could expedite the process. Such steps, in comparison to the current procedures, would be far more effective and efficient in terms of ensuring that the notice was delivered to the inmate, not just to a mailroom employee.

It bears mention that certified mail is no more likely to reach its destination than other mail. *See* USPS Domestic Mail Manual S912.1.1 (Apr. 5, 2001), *available at* http://pe.usps.gov. Its only advantage is that, in the usual case, the signed receipt provides proof that the goal of *actual* notice has been achieved. The signature of the interested party is critical to the adequacy of the mailed notice. Thus, for example, although Federal Rule of Civil Procedure 4(d) allows a plaintiff to serve a complaint by mail, that means of informing a defendant of the initiation of a lawsuit is called "waiver of service." This phrase was chosen by the Rules Committee to emphasize that service cannot be effected by mail "without the affirmative cooperation of the defendant." *See* Fed. R. Civ. P. 4(d), advisory committee's note to 1993 amendment. Service by mail, or waiver of service, calls for the *defendant* to sign a form acknowledging receipt and agreeing to waive formal service. If the defendant does not sign and return the form, the plaintiff must effect service by other means. Fed. R. Civ. P. 4(d), (e). Significantly, in 1982, the Rules Committee considered allowing service by certified mail, return receipt requested; but Congress, acting pursuant to 28 U.S.C. § 2074(a), rejected that form of notice out of concern that "registered and certified mail were not necessarily effective methods of providing actual notice to defendants of claims against them." 128 Cong. Rec. H 9848 (daily ed. Dec. 15, 1982) (statement of Rep. Edwards), *reprinted in* 1982 U.S.C.C.A.N. 4434, 4439.

Third, and for similar reasons, the burden on the Government of requiring actual notice is not significant. When the owner of the property is a federal inmate, the Government has the knowledge and the means to effect actual notice. *See also Weng*, 137 F.3d at 715 ("When such an investigating agency wishes to secure such a prisoner's cooperation in testifying against some important wrongdoer, it has no

difficulty delivering the message in a manner that insures receipt."). The Government already mails a notice to the facility where the inmate is housed. Given the Government's position of power, and the relationship between the agency pursuing the forfeiture and the Bureau of Prisons (both parts of the same executive branch and often, as in this case, the same agency), the additional step of providing actual notice would not be onerous.

Significantly, the case law does not question the feasibility of providing more reliable notice. *See, e.g., Whiting*, 231 F.2d at 76 (actual notice not required although "proof of actual delivery would give better assurance and is arguably quite feasible"). For example, the Third Circuit, sitting en banc, recognized that "[t]he relative burdens and benefits of additional steps to ensure actual notice . . . suggest that requiring greater efforts at assuring notice by the government is appropriate." *One Toshiba Television*, 213 F.3d at 154. That court nonetheless refused to require actual notice out of concern about "the evidentiary burden that [an actual notice] standard could impose after the passage of time." *Id.* Yet to ask the Government to retain a receipt signed by the inmate as proof of actual notice would not place an inappropriate evidentiary burden on the Government. This case and others show that the Government retains a remarkably complete record of the notice it provides—requests for and copies of newspaper publications, receipts indicating certified mail was sent, return receipts when obtained, and evidence that mail was returned unopened. *See* JA 13-30. Given the record that the Government already maintains, retaining a signed receipt from the inmate would not impose an additional burden. To the contrary, providing actual notice would save the Government the resources expended on the numerous post-forfeiture legal challenges by inmates who never received notice that their property rights were in jeopardy. *See, e.g.*, cases cited *supra* pages 14-15.

The Bureau of Prisons' Mail Management Manual provides that, although mailroom staff must sign the certified mail receipt:

> "[a] log shall be maintained which the inmate shall be required to sign prior to delivery, thus completing the chain of receipts. At institutions which elect to have unit staff sign for all receipt mail (certified, etc.), unit staff shall have the inmate sign a receipt log prior to delivering the receipt-type mail.

BOP Program Statement § 5800.10.409 (Nov. 3, 1995), *available at* http://www.bop.gov. Taking advantage of these Bureau of Prisons procedures, the Government, if it attempts to provide notice by certified mail, could without burden (1) retain in the forfeiture file a copy of the page of the prison mail log signed by the prisoner, (2) ask that the prisoner sign a receipt at the same time he or she signed the log book, for retention in the forfeiture file, or (3) retain the log book. *But see* National Archives and Records Administration, General Records Schedule 12, Communications Records (Transmittal No. 8 Dec. 1998), *available at* http://ardor.nara.gov/grs/grs12.html (agencies must destroy postal service records after one year). Whether the Government chose one of these or another method of proving actual delivery of the notice, the Bureau of Prisons' Mail Management Manual illustrates that obtaining an inmate's signature for receipt of mail is feasible and even expected by the Bureau of Prisons.

If the Government were "desirous of actually informing" federal inmates of the forfeiture proceedings, *Mullane*, 339 U.S. at 315, it could substitute for its current procedures the procedures suggested above, or similar procedures designed to ensure that the notice reached the inmate. The trade off—dropping the current mailings in favor

of procedures calculated to assure that the inmate received the notice—would increase the "probable value of the procedural safeguards" with little if any additional administrative burden on the Government.

The Government's interest in civil forfeiture cases such as this one is "primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." *United States v. Ursery*, 518 U.S. 267, 284 (1996). Civil forfeiture ensures that individuals do not profit from their illegal acts and serves the purpose of deterrence. *Id.* at 291, 292. Although these interests are important ones, the Government has no legitimate interest in using the forfeiture law to take property that was not used in connection with and was not the proceeds of a crime. It should go without saying that even individuals convicted of crimes have a right to retain property unrelated to the crime and that not all property in the possession of a criminal will be traceable to criminal activity. Accordingly, providing inmates with actual notice of forfeiture proceedings does not threaten the Government's legitimate interest in forfeiting the proceeds of illegal activity. It merely increases the chances that the Government will have to prove its case. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993) ("Fair procedures are not confined to the innocent. The question before us is the legality of the seizure, not the strength of the Government's case.").

This case also presents another type of government interest. Unlike in *Mullane*, where the state of New York created the notice rules but did not stand to benefit from ineffective notice, 339 U.S. at 308-09, in this case the Government is not a disinterested party. Here, any property not claimed will be taken by the Government. Because "the Government has a direct pecuniary interest in the outcome," due process protection is of "particular importance here."

James Daniel Good Real Property, 510 U.S. at 55-56; *cf. Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit."). Where the Government has a pecuniary interest in the effectiveness (or ineffectiveness) of notice, any assertion of burden should be closely scrutinized.

Finally, the third *Mathews* prong considers the public interest. *Mathews*, 424 U.S. at 347. Because procedural due process protections minimize "substantively unfair or mistaken deprivations of property," *James Daniel Good Real Property*, 510 U.S. at 53 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972)), the public interest in due process is extremely high. Reflecting its value to society, "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions . . . ." *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

Weighing the three *Mathews* factors—the private interest, the risk of error and the probable value of additional or different procedures, and the Government's interest—the balance is lopsidedly in favor of better procedures for providing notice of forfeitures to federal inmates. Indeed, all of the factors weigh on the same side of the scale. Although the Government's current practice involves several forms of notice—newspaper notice, notice mailed to the inmate's home, and notice sent to the prison—none is well-tailored, under the circumstances, to inform inmates that they have twenty days to take action or lose all rights to their property.

2. *Mullane* ties the adequacy of notice to the circumstances presented in the individual case. It holds that due process allows substitutes for personal service where such service imposes significant burdens and makes clear that a serious effort to inform interested parties is always required.

339 U.S. at 315, 318. Some lower courts have strayed from *Mullane*'s message, however, by misconstruing the Court's holdings in *Mullane* and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), as stating a rule that mailed notice is per se adequate notice. *See, e.g., Clark,* 84 F.3d at 381; *see also Whiting*, 231 F.3d at 77 (mail provides adequate notice unless government knew delivery in particular prison was unreliable). In fact, time and again, including in *Mullane* and *Mennonite Board of Missions*, this Court has instructed the lower courts to take just the opposite approach.

In *Mullane*, the property at issue consisted of a large number of small interests in a trust. The bank-trustee did not have addresses for all of the beneficiaries. Taking into account the specific characteristics of the situation before it, the Court held that notice mailed, without proof of delivery, to interested parties whose addresses were known was adequate notice, and that newspaper notice was adequate for interested parties whose addresses were not known. Because all of the individual interests were identical, "notice reasonably certain to reach most of those interested in objecting [was] likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all." 339 U.S. at 319. "[U]nder such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable." *Id.* The Court concluded that because the bank had provided newspaper notice only, the notice was inadequate since "under the circumstances it [was] not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.*

In *Mennonite Board of Missions*, the Court held that, when a mortgage holder is identified in a publicly-recorded mortgage, a state must provide notice to the mortgage holder by personal service or by mail to the last known address, prior to selling private property in a tax sale. 462 U.S. at 798.

Although the opinion treats mailed notice and personal service equally for purposes of that case, the Court was addressing a "sophisticated" and "particularly resourceful" creditor. *Id.* at 799, 800. The Court made clear that its decision did not retreat from the rule that "particularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence." *Id.* at 799 (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13-15 (1978); *Covey v. Town of Somers*, 351 U.S. 141 (1956)).

These cases, and the Court's due process jurisprudence as a whole, reflect the principle, to which the Court has "adhered unwaveringly," that "the State must make efforts to provide *actual* notice to all interested parties." *Mennonite Bd. of Missions*, 462 U.S. at 796-97 (emphasis added). Thus, in *Hess v. Pawloski*, 274 U.S. 352 (1927), when this Court first recognized that service by registered mail, as opposed to personal service, could satisfy due process, the statute at issue required that the defendant "actually receive" the notice, *id.* at 356, and required the plaintiff to file the registered mail receipt, *signed by the defendant*, as proof that actual notice had been provided. *Id.* at 354. *Hess*, like subsequent cases, considered the method of notice in the context of the facts presented. *See id.* at 356. Since then, although it has become accepted that mail *may* provide a constitutionally adequate means of providing notice, one would search in vain for a declaration by this Court that mailed notice is per se adequate notice. *See Covey v. Town of Somers*, 351 U.S. at 147 (mailed notice inadequate in circumstances presented). Indeed, such a rule would contradict this Court's repeated admonition that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union*, 367 U.S. at 895.

In short, this Court has allowed mailed notice to substitute for personal service where there was a sound basis to conclude that mail presented a reliable means of delivery, and thus of actual notice, to the intended recipient. At the same time, the Court has stated that circumstances could require more "extensive efforts to provide notice." *Mennonite Bd. of Missions*, 462 U.S. at 799. This case presents such circumstances. Mail sent in care of a prison is not a reliable means of getting notice to an inmate; but Petitioner, and inmates in similar circumstances, could "easily be informed by other means at hand." *Mullane*, 339 U.S. at 319.

In these circumstances, unlike those in *Mullane*, where numerous trust beneficiaries had identical interests, the inmate is almost always the *only* person whom the Government is seeking to inform of the proceedings. Therefore, unlike the beneficiaries in *Mullane*, if the inmate does not receive actual notice, no one will come forward to protect his or her interests. Moreover, unlike the bank in *Mullane*, the Government knows the exact location of the property owner. Unlike the mortgage holder in *Mennonite Board of Missions*, an inmate is unlikely to have a sophisticated "ability to take steps to safeguard its interests." 462 U.S. at 799. And, unlike the facts in both of those cases, when mail is sent to an inmate, it is not sent directly to its intended recipient, but through at least two additional intermediaries (mailroom staff and housing unit staff). As with the child's game of "telephone," the chance of error increases with each additional person through whom the message passes. Due process requires more than the notice the government attempted here.

B. Because The Forfeiture Was Effected Without Due Process, It Is Void.

1. "Forfeitures are not favored; they should be enforced only when within both [the] letter and spirit of the law." *United States v. One 1936 Model Ford Coach*, 307 U.S. 219, 226 (1939). And when an individual has been deprived of property without due process, "only 'wiping the slate clean . . . [will] restore[] the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.'" *Peralta v. Heights Medical Center*, 485 U.S. 80, 87 (1988) (citation omitted); *see also McDonald v. Mabee*, 243 U.S. 90, 92-93 (1917) ("personal judgment for money, invalid for want of service amounting to due process of law is . . . ineffective" and "was not merely voidable . . . but was void"). Thus, as held by the majority of the circuit courts to have considered the issue, a forfeiture proceeding conducted without proper notice to the property owner is void. *See One Toshiba Television*, 213 F.3d at 156; *United States v. Marolf*, 173 F.3d 1213, 1216 (9th Cir. 1999); *Clymore v. United States*, 164 F.3d 569, 573 n.5 (10th Cir. 1999); *Muhammed v. DEA*, 92 F.3d 648, 654 (8th Cir. 1996); *Barrera-Montenegro v. United States*, 74 F.3d 657, 661 (5th Cir. 1996); *United States v. Giraldo*, 45 F.3d 509, 512 (1st Cir. 1995); *see also United States v. 2751 Peyton Woods Trail*, 66 F.3d 1164, 1166-67 (11th Cir. 1995) (where forfeiture of real property void for lack of pre-seizure notice and hearing, new proceedings allowed "[i]f statutory time constraints permit"). *But see Dusenbery*, 201 F.3d at 768 (forfeiture voidable but not void); *Small*, 136 F.3d at 1338 (where property forfeited without adequate notice, inmate entitled to hearing on merits of claim; no discussion of statute of limitations); *Boero v. DEA*, 111 F.3d at 307 (same).

In this case, the statute of limitations allowed the Government five years from discovery of the offense to initiate

forfeiture proceedings. *See* 19 U.S.C. § 1621. At the latest, then, the statute began to run in April 1986, when Petitioner was arrested and the $21,939 was seized. Petitioner did not receive notice of the forfeiture until 1994, in the Government's response to his motion for return of property. *See* R 85, 103. In these circumstances, where the Government failed to give constitutionally adequate notice within the statutory period, the forfeiture is not only void, but the motion for return of property must be granted.

Statutes of limitations "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citation omitted). Limitations periods "afford[] plaintiffs what the legislature deems a reasonable time to present their claims" and "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by" loss of evidence, disappearance or death of witnesses, fading memories, or otherwise. *Id.* For example, in a forfeiture case, proof of legitimate ownership may disappear, and the owner's memory of the source or value of property may fade.

Although statutes of limitations may sometimes be tolled on equitable grounds, *see* 4 C. Wright & A. Miller, *Federal Practice & Procedure* § 1056 & cases cited at n.25.1 (2d ed. Supp. 2000), where the statute has expired due to the government's own failure to provide due process--an omission entirely in the Government's control—equitable tolling is inapplicable. *See United States v. Giovanelli*, 998 F.2d 116, 119 (2d Cir. 1993) (forfeiture statutes "impose no duty on a defendant to prevent the government from losing its rights through carelessness"). Moreover, in this case, the Government

has never contested that Petitioner did not receive actual notice, *see*, *e.g.*, JA 40, and has never suggested that Petitioner acted improperly in not moving sooner for return of his property. For example, the Government has never argued that Petitioner knew of the forfeiture proceeding but sat on his rights until the statute of limitations had expired. Instead, it has accepted Petitioner's statement that he never received actual notice and, essentially, responded "tough luck." Congress' judgment, however, as expressed in the statute of limitations provision, 19 U.S.C. § 1621, is to the contrary. *Cf. United States v. Brockamp*, 519 U.S. 347, 350-51 (1997) (no equitable tolling of tax code limitations period where limitations set out in detail and "statute sets forth explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling'").

2. In the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000) (codified at 18 U.S.C. § 983), Congress tried to respond to some of the due process problems manifested by the many post-forfeiture challenges in this and other contexts. The Act does not specify how notice is to be provided but does outline a procedure for challenging a forfeiture for lack of notice. The Act provides that, if the challenge is successful, the Government may commence a new forfeiture proceeding "[n]otwithstanding the expiration of any applicable statute of limitations." Pub. L. No. 106-185, § 2(a) at § 983(e)(2)(A). This provision illustrates that Congress was aware that the Government often faces a statute of limitations problem after a forfeiture is void for lack of notice and that it wanted to remove that barrier to commencing a new forfeiture proceeding.

As the Government recognizes, *see* Cert. Opp. at 11, the 2000 Act is applicable only to forfeiture proceedings

commenced on or after August 23, 2000, and does not apply to Petitioner's case. *See* Pub. L. No. 106-185, § 21. Here, the forfeiture is void, and the parties therefore return to the same positions they were in before the proceedings began. Because Congress does not permit forfeiture proceedings commenced prior to August 23, 2000, to be initiated more than five years after seizure of the property, the Government may not now bring a forfeiture action against Petitioner's $21,939.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be reversed and the case remanded with instructions that the forfeiture is void.

Respectfully submitted,

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